

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing)	
the Telephone Consumer Protection)	CG Docket No. 05-338
Act of 1991)	
)	
Junk Fax Prevention Act of 2005)	

**COMMENTS OF THE
NEWSLETTER & ELECTRONIC PUBLISHERS ASSOCIATION**

I. INTRODUCTION

The Newsletter & Electronic Publishers Association (“NEPA”) submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“*NPRM*”).¹

NEPA is a trade association representing publishers of approximately 3,000 newsletters and other specialized information services. Collectively, members of NEPA publish on virtually every major subject of public concern, with titles ranging quite literally from A to Z: *Air Safety Week* to *Inside Mortgage Finance* to the *Zoning Bulletin*. Newsletter journalists regularly report on a multitude of federal agencies, including the FCC, and newsletter journalists are accredited members of the Periodical Press Gallery in Congress, the White House press corps, and other such institutions, domestic

¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, 70 Fed. Reg. 75102 (Dec. 19, 2005).

and international. Although any one newsletter may have a small subscription base when compared to that of a daily metropolitan newspaper, the typical subscriber depends upon a given newsletter for specialized, accurate and up-to-the-minute information and analysis of developments and trends in a focused area. Unlike mass circulation newspapers and magazines, many newsletters eschew advertising to better maintain their editorial integrity and therefore the survival of a given newsletter may be wholly dependent on maintaining its subscription base.

Marketing by facsimile is critical to the success of publications with a specialized focus, such as newsletters, because these publications typically have a more limited potential audience than do general interest, mass circulation publications. Targeted fax communication is among the least intrusive, most cost effective means for newsletter publishers to communicate with subscribers regarding subscription renewals, or to market new publications and products of interest to their current and former subscribers.

II. NEPA WELCOMES THE CODIFICATION OF THE “ESTABLISHED BUSINESS RELATIONSHIP” EXCEPTION TO THE TCPA

NEPA welcomes the Commission’s codification of the so-called “established business relationship” exception to the Telephone Consumer Protection Act (“TCPA”),² as recently mandated by the Junk Fax Prevention

² 47 U.S.C. § 227; implementing regulations at 47 C.F.R. § 64.1200.

Act of 2005.³ Indeed, in the context of the FCC's related TCPA proceedings in CG Docket 02-278, NEPA urged the FCC to formalize the established business relationship exception in order that publishers could continue to communicate appropriately with current and former subscribers via facsimile.

While NEPA acknowledges the need for the FCC to regulate certain telemarketing practices, we offer these comments to help the Commission develop rules that will not interfere with the ability of newsletter publishers to communicate legitimately and effectively with subscribers and potential subscribers about their publications and services. In this regard, we think it bears emphasis that newsletter publishers, as legitimate businesses, have conscientiously attempted to comply with the TCPA and the FCC's implementing regulations since the Act took effect in 1991. By the same token, however, it appears from comments filed in this proceeding and in CG Docket 02-278 that consumers are frustrated by the tactics of unscrupulous marketers who refuse to voluntarily comply with the TCPA. Publishers too are on the receiving end of such tactics. Be that as it may, NEPA thinks it imperative that, in considering how to implement the established business relationship exception, the FCC resist the temptation to adopt onerous restrictions on legitimate businesses who market by fax to address consumer complaints about so-called "junk" faxers who are no more likely to comply

³ Pub. L. No. 109-21, 119 Stat. 359 (2005).

with such restrictions than they have been willing to comply with existing regulations.

A. Definition of the Established Business Relationship Exception

The Commission's *Notice of Proposed Rulemaking* seeks public comment on the following definition of the established business relationship exception:

[T]he term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such a person or entity, which relationship has not been previously terminated by either party.⁴

We think it vital that publishers have guidance from the Commission on this issue and therefore support the adoption of language making it clear that an established business relationship may be formed both on the basis of an inquiry or application or, alternatively, on the basis of a purchase or transaction. The proposed definition is also consistent with the established business relationship exception recognized in the Commission's rules for telephone solicitations.⁵ It would be beneficial to consumers and marketers alike for the FCC to define the exception similarly in related contexts.

⁴ *NPRM*, 70 Fed. Reg. at 75106.

⁵ *See* 47 C.F.R. § 64.1200(f)(3).

B. Duration of the Established Business Relationship Exception

Regarding the duration of the exception in the fax advertising context, the necessity for a fixed duration should depend, as the FCC posits, on whether it can be demonstrated that a “significant number of complaints regarding facsimile advertisements [have been filed by consumers because marketers have employed] an EBR of a duration that is inconsistent with the reasonable expectations of consumers.”⁶ In the absence of such a demonstration, no fixed duration should be imposed.

In the collective experience of NEPA members, few subscribers with whom individual publishers have a business relationship have lodged objections to receiving fax advertisements due to the passage of time following an inquiry or purchase. This is so because fax communications in such circumstances allow publishers to directly provide information to those businesses or individuals most likely to be interested in their publications and therefore least likely to object, *i.e.*, those businesses who have affirmatively expressed an interest in the subject matter area by subscribing currently or in the past. For those few who do object, regardless of the duration of the established business relationship exception (or in the absence of a fixed duration), future facsimile transmissions can easily be prevented by registering that objection with the sender of the facsimile. Even if the penalties under the TCPA were not enough to ensure prompt compliance

⁶ *NPRM*, 70 Fed. Reg. at 75106.

with a request not to fax by an existing customer, there is no incentive for a legitimate small business owner – particularly a newsletter publisher whose very livelihood is dependent on a limited subscription base – to ignore such a request. In any event, to the extent the FCC determines it necessary to limit the duration of the established business relationship exception, the Commission should limit the exception no more narrowly than it currently does in the context of telephone solicitations, *i.e.*, to eighteen months following a purchase or transaction and to three months after an application or inquiry.⁷

III. OPT-OUT REQUESTS MADE BY DESIGNATED MECHANISMS SHOULD BE PROCESSED IN NO MORE THAN THIRTY DAYS

A. Time for Processing Opt-Out Requests

Regarding notice of the opportunity to opt-out of future facsimile solicitations, NEPA supports the Commission's proposal to require that opt-out requests be honored within a reasonable period of time not to exceed thirty days from the date of the request.⁸ As noted, legitimate marketers have little incentive to do anything but promptly comply with an opt-out request. However, particularly for small publishers, opt-out processing may not be entirely automated. And the individual employee tasked with ensuring compliance with opt-out requirements likely has many other duties.

⁷ *See* 47 C.F.R. § 64.1200(f)(3).

⁸ *NPRM*, 70 Fed. Reg. at 75106-07.

In the marketing realm alone, employees tasked with compliance responsibilities at small publishers are confronted with an array of federal (and often state) obligations with respect to facsimile, phone and e-mail marketing. With respect to larger publishers, who may have more resources to devote to legal compliance issues, these businesses may rely upon outside advertising distribution vendors. The process of coordination required necessitates that marketers be given a reasonable period of time to facilitate the processing of opt-out requests, especially where the TCPA imposes significant penalties on those who fail to timely comply with such requests.⁹

Some may advocate for a shorter period to process opt-out requests for fear that marketers will use any longer period to bombard recipients with fax solicitations during the permitted interval. However, legitimate marketers (among them, newsletter publishers) do not bombard individuals with solicitations over and over again because such a practice is counterproductive to establishing a continuing business relationship with a fax recipient. Instead, such tactics are the *modus operandi* of “junk” faxers who are not

⁹ Because individuals who receive fax advertisements purportedly in violation of the TCPA can bring private lawsuits seeking statutory damages, the threat of legal action in state court is very real. Particularly in recent years, NEPA members have been sued or threatened with suit under the TCPA by some complainants asserting debatable violations of the TCPA. For many small businesses, it is often cheaper to settle such claims, even when they lack apparent merit, than to bear the considerable expense of litigating them in a jurisdiction often far removed from the marketer’s principal place of business.

likely to voluntarily comply with opt-out requests, regardless of the time frame established for processing them.¹⁰

B. Mechanism for Communicating Opt-Out Requests

Finally, NEPA believes that, in order for an opt-out request to be valid, such a request should be made pursuant to the mechanism designated by the fax sender on the advertisement itself. Because the Junk Fax Prevention Act requires fax senders to bear the burden of establishing a cost-free mechanism for processing requests, it is only appropriate that fax recipients be asked to use such mechanisms. Moreover, requiring the use of designated mechanisms dramatically increases the likelihood that opt-out requests will be received by the appropriate employee and expeditiously processed. As a customer service imperative, newsletter publishers and other marketers who value their existing business relationships will still have a strong incentive to comply with requests received by other means. However, publishers should not be subject to the significant penalties that the TCPA imposes for

¹⁰ Regarding related issues raised by the Commission concerning notice of the opportunity to opt-out, NEPA supports modification of the FCC's existing fax sender identification requirements to avoid duplication between those requirements and the identifying information necessarily included within the opt-out notice mandated by the Junk Fax Prevention Act. NEPA also believes that a legible opt-out notice contained on the first page of a facsimile ad should be considered "clear and conspicuous" within the meaning of the Commission's regulations, as such notice would "be apparent to the reasonable consumer." 47 C.F.R. § 64.2401(e). In addition, NEPA agrees that a toll-free telephone number, local telephone number, website or email address should each be considered a "cost-free" mechanism for facilitating opt-out requests, although there may be other equivalent mechanisms that also suffice.

advertisements sent in derogation of an opt-out request in circumstances in which, because the fax recipient did not use the cost-free mechanism provided, the publisher may have been unaware of the request.

IV. WRITTEN, SIGNED CONSENT SHOULD NOT BE REQUIRED TO SEND A FACSIMILE ADVERTISEMENT

NEPA also strongly endorses the Commission's explicit recognition, as required by the Junk Fax Prevention Act, that "prior express permission [to send a facsimile advertisement] may be formed by means other than a signed, written statement that indicates the recipient's consent to receive facsimile advertisements."¹¹ Simply put, it serves no worthwhile purpose, either from a regulatory or a business perspective, to require customers who orally or otherwise request a facsimile to be compelled by law to fill out a consent form repeating that same request in writing. Such a requirement would only increase consumer frustration, not mitigate it. NEPA does not believe it is incumbent upon the Commission to enumerate every circumstance in which permission may be formed in the absence of written consent. Oral permission should be sufficient to grant permission to fax, along with other forms of consent that may fall short of a written, signed contract but, nevertheless, objectively demonstrate the fax recipient's assent to receiving advertising materials in the future. At bottom, the FCC should *not* impose rules that require newsletter publishers and other small business

¹¹ *NPRM*, 70 Fed. Reg. at 75105.

owners to undertake an analysis of whether a particular communication constitutes, in effect, an enforceable oral or written contract to send a facsimile.¹² Such a requirement is wholly unnecessary. Even if, for example, an e-mail consenting to a facsimile transmission falls short of being binding under state contract law, there is no conceivable harm to the consumer by fulfilling such an affirmative, if inartfully put request.¹³

V. CONCLUSION

As Congress initially observed in enacting the telemarketing portion of the TCPA, where an established business relationship exists, “consumers would be less annoyed and surprised by [an] unsolicited call since the consumer would have a recently established interest in the specific products or services.” H.R. Rep. No. 102-317, at 14 (102nd Cong. 1st Sess. 1991). The

¹² See Rules and Regulations Implementing the Telephone Consumer Protection Act, 68 Fed. Reg. at 44144, 44177 (July 25, 2003) (proposing revisions to § 64.1200(a)(3)(i) requiring that consent to receive a facsimile advertisement must be “evidenced by a signed, written statement”).

¹³ Similarly, NEPA believes it an unnecessary burden to impose on a marketer who has an established business relationship with a consumer and who “obtains [that consumer’s] facsimile number from a directory, advertisement, or site on the Internet” an affirmative obligation to confirm that the subscriber’s facsimile number was “voluntarily” made public. *NPRM*, 70 Fed. Reg. at 75105. Such an obligation would be particularly burdensome on “mom and pop” newsletter publishers with limited staff and resources. In the seemingly unlikely event that a facsimile number was obtained and made public involuntarily, the requirements of the Junk Fax Prevention Act provide a simple, cost free mechanism for fax recipients to opt out of all future solicitations.

same is equally true in the facsimile advertising context, as Congress reiterated in enacting the Junk Fax Prevention Act last year. For those customers who nevertheless object to such advertisements, these communications can easily be prevented – even where there is an established business relationship – simply by registering that objection with the sender of the facsimile. Because marketing by facsimile is critical to the success of publications with a specialized focus, NEPA urges the Commission to avoid the temptation to impose new restrictions on legitimate marketers such as newsletter publishers in response to the tactics of so-called “junk” faxers. Instead, consistent with its obligations under the Junk Fax Prevention Act, the Commission in this proceeding should endeavor to strike an appropriate balance between reasonable consumer privacy expectations and the need for businesses to communicate with their existing and potential customers.

Respectfully submitted,

By: /s/

Patricia M. Wysocki

Executive Director
Newsletter & Electronic Publishers

Association

1501 Wilson Boulevard, Suite 509
Arlington, Virginia 22209
(703) 527-2333
Facsimile: (703) 841-0629